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Wynn Resorts (Macau) SA v Wang Yen Liang

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-222–06 OF 2016
NOORIN BADARUDDIN J
16 FEBRUARY 2017

C *Civil Procedure — Striking out — Application to strike out plaintiff's claim — Plaintiff filed action against defendant for recovery of sum due and owing — Defendant applied to strike out plaintiff's claim under O 12 r 10(1), (2) and (7), O 18 r 19(1)(b) or (d), and/or O 92 r 4 of the Rules of Court 2012 — Whether court had jurisdiction to hear plaintiff's claim — Whether court*
D *appropriate forum — Whether plaintiff's claim legitimate*

The plaintiff, vide the credit agreement dated 10 May 2013, the credit line increase request dated 23 May 2014, the credit line increase request dated
E 24 May 2014, the markers and the promissory note ('the credit documents'), had granted facilities amounting to HKD20m to the defendant. The plaintiff filed the present suit to recover the sum of HKD19,184,360 under the said facilities which the defendant utilised at the casino operated by the plaintiff in Macau. In response, the defendant filed an application to stay or strike out the
F plaintiff's claim ('encl 8') under O 12 r 10(1), (2) and (7), O 18 r 19(1)(b) or (d), and/or O 92 r 4 of the Rules of Court 2012 ('the ROC'). The defendant's main contention was that the loan/credit facility was for the defendant to gamble in the plaintiff's Macau casino and as gambling was illegal in Malaysia, the plaintiff's action must be struck down. The defendant sought to rely on s 5
G of the Betting Act 1953 ('the BA') and s 5 of the Common Gaming Houses Act 1953 ('the CGHA') ('the said provisions') in arguing that the plaintiff's loan was illegal in nature. The issues for determination were: (a) whether the court had jurisdiction to hear the matter; (b) whether the court was the appropriate forum; and (c) whether the plaintiff's claim was a legitimate claim.

H

Held, dismissing the defendant's application in encl 8 with costs:

(1) The material before the court showed that the defendant resided in Kuala Lumpur. The cause of action therefore arose when the plaintiff through
I its solicitors in Kuala Lumpur demanded for the repayment of the loan/credit facilities from the defendant in Kuala Lumpur and the refusal on the part of the defendant to make such payment was also in Kuala Lumpur and as such, the court was seized with the jurisdiction to hear the matter (see para 39).

(2) The clause in the credit agreement dated 10 May 2013 referred to by the defendant provided the discretion to the plaintiff to file a suit in Macau. Reading of the clause would also mean that the plaintiff had discretion to choose not to exercise it as in the present case where the plaintiff had decided to initiate the cause of action in Kuala Lumpur. The said clause did not state that it was mandatory for the action to be filed in Macau. No exclusive jurisdiction was conferred by the said clause (see paras 40–41).

(3) The defendant's contention that the court was *forum non-conveniens* was untenable because in the present case, the cause of action arose in Kuala Lumpur, the plaintiff had affirmed the affidavit stating that the witnesses were prepared to testify in Kuala Lumpur, there was no agreement that any court outside Kuala Lumpur had exclusive jurisdiction and the fact that the plaintiff would have difficulty in enforcing the judgment in this country as Macau was not listed under the Reciprocal Enforcement of Judgments Act 1958 (see para 46).

(4) The BA and the CGHA are penal statutes which aim to control common betting and gaming houses in the territory of Malaysia which are not licensed under s 27 of the CGHA. The casino in question in which the loan was granted to the defendant was a duly licensed outlet operating in Macau. As such the said provisions relied on by the defendant had no application on any business conducted by the plaintiff legally out of Malaysia nor on the loan in question (see para 55).

(5) At this stage, the court could not decide under O 18 r 19(1) of the ROC whether the plaintiff's claim was legitimate or otherwise. This was definitely not a plain and obvious case to be struck out and the court must go to the distance and make the ultimate findings at the end of a full trial after hearing evidence and more thorough analysis of the law. The very fact that the defendant labelled the plaintiff's claim as 'gambling winnings' when the credit documents and the nature of the transaction pointed otherwise warranted the matter to be heard on merits rather than being struck out prematurely (see paras 51 & 90).

[Bahasa Malaysia summary

Plaintif melalui perjanjian kredit bertarikh 10 Mei 2013, permohonan penambahan barisan kredit bertarikh 23 Mei 2014, permohonan penambahan barisan kredit bertarikh 24 Mei 2014, penanda dan nota janji hutang ('dokumen-dokumen kredit'), telah memberikan kemudahan berjumlah sebanyak HKD20 juta kepada defendan. Plaintif memfailkan tindakan ini untuk mendapatkan kembali jumlah sebanyak HKD19,184,360 di bawah kemudahan tersebut yang mana digunakan oleh defendan di kasino yang dioperasi oleh plaintif di Macau. Dalam menjawab, defendan memfailkan permohonan untuk penangguhan atau pembatalan tuntutan plaintif ('lampiran 8') di bawah A 12 k 10(1), (2) dan (7), A 18 k 19(1)(b) atau (d),

dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Hujahan utama defendan adalah bahawa kemudahan pinjaman/kredit tersebut adalah untuk defendan berjudi di kasino Macau plaintif dan memandangkan judi adalah haram di Malaysia, tindakan plaintif mesti dibatalkan. Defendan memohon untuk bergantung ke atas s 5 Akta Pertaruhan 1953 ('AP') dan s 5 Akta Rumah Judi Terbuka 1953 ('ARJT') ('peruntukan-peruntukan tersebut') dalam berhujah bahawa pinjaman plaintif adalah bersifat salah di sisi undang-undang. Isu-isu untuk penentuan adalah: (a) sama ada mahkamah mempunyai bidang kuasa untu mendengar perkara tersebut; (b) sama ada mahkamah adalah forum yang sesuai; dan (c) sama ada tuntutan plaintif adalah tuntutan sah.

Diputuskan, menolak permohonan defendan dalam lampiran 8 dengan kos:

(1) Material di hadapan mahkamah menunjukkan bahawa defendan tinggal di Kuala Lumpur. Kausa tindakan oleh itu berbangkit apabila plaintif melalui peguamcaranya di Kuala Lumpur meminta untuk bayaran balik kemudahan pinjaman/kredit daripada defendan di Kuala Lumpur dan penolakan oleh pihak defendan untuk membuat bayaran sedemikian juga adalah di Kuala Lumpur dan oleh itu, mahkamah mempunyai bidang kuasa untuk mendengar perkara tersebut (lihat perenggan 39).

(2) Klausa di dalam perjanjian kredit bertarikh 10 Mei 2013 dirujuk oleh defendan memperuntukkan budi bicara kepada plaintif untuk memfailkan tindakan di Macau. Membaca klausa juga akan bermaksud bahawa plaintif mempunyai budi bicara untuk memilih tidak melaksanakannya seperti dalam kes ini di mana plaintif telah memutuskan untuk memulakan kausa tindakan di Kuala Lumpur. Klausa tersebut tidak menyatakan yang ia adalah mandatori untuk tindakan difailkan di Macau. Tiada bidang kuasa eksklusif diberikan oleh klausa tersebut (lihat perenggan 40–41).

(3) Hujahan defendan bahawa mahkamah adalah *forum non-conveniens* tidak boleh dipertahankan kerana dalam kes ini, kausa tindakan berbangkit di Kuala Lumpur, plaintif telah mengesahkan afidavit menyatakan bahawa saksi-saksi adalah bersedia untuk memberi keterangan di Kuala Lumpur, tidak terdapat perjanjian bahawa mana-mana mahkamah di luar Kuala Lumpur mempunyai bidang kuasa eksklusif dan fakta bahawa plaintif akan mendapat kesusahan dalam menguatkuasakan penghakiman dalam negara ini kerana Macau tidak disenaraikan di bawah Akta Penguatkuasaan Penghakiman Bersaling 1958 (lihat perenggan 46).

(4) AP dan ARJT adalah statut penalti yang bertujuan untuk mengawal judi terbuka dan rumah perjudian di Malaysia yang mana tidak berlesen di bawah s 27 ARJT. Kasino yang dipersoalkan yang mana pinjaman diberikan kepada defendan adalah kedai berlesen yang beroperasi di

Macau. Dengan itu peruntukan tersebut yang digunakan oleh defendan tidak mempunyai aplikasi atas mana-mana perniagaan yang dilakukan oleh plaintif secara sah di luar Malaysia atau pun atas pinjaman yang dipersoalkan tersebut (lihat perenggan 55).

(5) Pada peringkat ini, mahkamah tidak dapat memutuskan di bawah A 18 k 19(1) KKM sama ada tuntutan plaintif adalah sah atau sebaliknya. Ini pastinya bukan kes yang jelas dan nyata untuk dibatalkan dan mahkamah mesti menyelesaikannya dan membuat dapatan muktamad pada akhir perbicaraan penuh selepas mendengar keterangan dan penelitian lebih analisa undang-undang. Fakta bahawa defendan melabelkan tuntutan plaintif sebagai 'gambling winnings' apabila dokumen-dokumen kredit dan sifat transaksi menunjukkan sebaliknya mewajarkan perkara tersebut didengar atas merit daripada dibatalkan secara pra matang (lihat perenggan 51 & 90).]

Notes

For a case on application to strike out plaintiff's claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 9355.

Cases referred to

Aspinall Curzon Ltd v Khoo Teng Hock [1991] 2 MLJ 484, HC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
CHT Ltd v Ward [1965] 2 QB 63, CA (distd)
Chengdu Malaysia Education Consulting Service Pte Ltd v Twintech Holdings Sdn Bhd [2015] MLJU 938; [2015] 1 LNS 205, HC (refd)
Egerton v Brownlow (Earl) (1853) 4 HLC 1, HL (refd)
Hill v William Hill (Park Lane) LD [1949] AC 530, HL (distd)
Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322, CA (refd)
Jupiters Ltd (trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor [2007] 7 MLJ 228; [2008] 7 CLJ 715, HC (distd)
Jupiters Limited (trading as Conrad International Treasury Casino) v Lim Kin Tong [2005] MLJU 534; [2006] 5 CLJ 277, HC (distd)
Kie Gwan Shipping (M) Sdn Bhd v Federal Flour Mills Bhd [1986] MLJU 1; [1988] 1 CLJ Rep 669, HC (refd)
Kuan Leong Hin v The State of Johore [1941] 1 MLJ 231 (refd)
Las Vegas Hilton Corporation (trading as Las Vegas Hilton) v Khoo Teng Hock Sunny [1996] 2 SLR (R) 589, HC (refd)
Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281; [1992] 1 CLJ Rep 173, SC (refd)
Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548, HL (distd)
Loh Chee Song v Liew Yong Chian [1998] 2 SLR 641, HC (refd)
Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara

Maju Bhd [1997] 1 MLJ 557; [1997] 1 CLJ 417, CA (refd)
New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation) [1987] 2 MLJ 57, SC (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Ors [1990] MLJU 1; [1991] 1 CLJ 776, HC (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558, HC (distd)
Quek Chiau Beng v Phua Swee Pah Jimmy [2001] 1 SLR 762; [2000] 3 SLR (R) 761, HC (distd)
Rex v Weisz and another, ex parte Hector MacDonald LD [1951] 2 KB 611, KBD (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651, CA (refd)
Sediperak Sdn Bhd v Baboo Chowdhury [1999] 5 MLJ 229, HC (refd)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141, CA (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (distd)
Star City Pty Ltd (formerly known as Sydney Harbour Casino Pty Ltd v Tan Hong Woon [2002] 1 SLR (R) 306, CA (distd)
Star Cruise Services Ltd v Overseas Union Bank Ltd [1999] 2 SLR 412, HC (refd)
Sun Cruises Ltd v Overseas Union Bank Ltd [1999] 2 SLR (R) 611, HC (distd)
The Aspinal Curzon Ltd v Khoo Teng Hock [1991] 2 MLJ 484, HC (refd)
The Atlantic Star: The owners of the Atlantic Star v The owners of the Bona Spes [1973] 2 ALL ER 175, HL (refd)
The Hongkong & Shanghai Banking Corporation Limited v Tan Sock Gin [1999] MLJU 406; [1999] 7 CLJ 450, HC (refd)
The Perak Iron Mining Co Ltd v Chong Voon Kim [1962] 1 MLJ 270, CA (refd)
Thong Foo Ching & Ors v Shigenori Ono [1998] 4 MLJ 585, CA (refd)
Wai Hin Tin Mining Co Ltd v Lee Chow Beng [1968] 2 MLJ 251 (refd)

Legislation referred to

Betting Act 1953 s 5
Civil Law Act 1956 s 26, 26(1), (2), (4)
Civil Law Act (SG) s 6
Common Gaming Houses Act 1953 ss 5, 27A
Contracts Act 1950 ss 24, 24(a), (b), (e), 31, 66, 70, 71
Courts of Judicature Act 1964 ss 23, 23(1)(a), (1)(b)
Evidence Act 1950 s 91
Gaming Act 1968 [UK]
Indian Contract Act 1872 [IND] ss 69, 70
Reciprocal Enforcement of Judgments Act 1958 ss 4, 5
Rules of Court 2012 O 12 r 10(1), (2), (7), O 18 r 19(1), O 18 r 19(1)(b), (1)(d), O 92 r 4

Richard WG Lee (Shiyamala Devi Manokaran and Muhamad Muhaimin Azmi with him) (Jeff Leong, Poon & Wong) for the plaintiff.
Manpal Singh (Tan Weng Hung and Philip Ryan Mathew with him) (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the defendant.

Noorin Badaruddin J:

[1] This is the defendant's application in encl 8 to stay or strike out the plaintiff's claim, under O 12 r 10(1), (2) and (7), O 18 r 19(1)(b) or (d) and/or O 92 r 4 of the Rules of Court 2012 ('the ROC').

[2] On 6 December 2016, this court dismissed the application and the reasons now follow.

THE STATEMENT OF CLAIM

[3] The plaintiff, Wynn Resorts (Macau) SA is a company incorporated in Macau Special Administrative Region and the defendant was and is at all material time, a Malaysian citizen and believed to have three residential addresses in Jalan Sri Hartamas Kuala Lumpur, Bukit Damansara Kuala Lumpur and Ara Damansara, Petaling Jaya Selangor.

[4] It is stated that at the defendant's request and by signing three credit documents, the plaintiff agreed to offer a total loan for an amount of HKD20m to the defendant and the loan agreements are subjected to and governed under the laws in Macau. The credit documents are as follows:

(a) a credit agreement dated 10 May 2013 for HKD10m;

(b) a credit line increase request dated 23 May 2014; and

(c) a credit line increase request dated 24 May 2014 for another HKD10m.

[5] The loan sum was given to the defendant on or about 23 May 2014 and 24 May 2014.

[6] In consideration for the loan sum granted by the plaintiff, the defendant is stated to have executed a promissory note No 0020334 which is subject to and governed under the laws in Macau with the other details left in blank to guarantee his repayment of the loan sum back to the plaintiff and also signed on six credit instruments commonly known as 'Markers' in favour of the plaintiff.

[7] The defendant is stated to have had a credit balance of HKD815,640 in his account with the plaintiff (being the commission sum of HKD515,640

given by the plaintiff to the defendant and the front money in the amount of HKD300,000 ('monies'). The sum claimed is due and payable by the defendant to the plaintiff for the loan sum (after the deduction of the monies) as at 24 May 2014 is HKD19,184,360 ('sum due and owing').

[8] The plaintiff had instructed its solicitors in Hong Kong to issue a letter of demand dated 20 April 2015 to the defendant demanding for the repayment of the sum due and owing. As no payment was made the plaintiff then instructed its solicitors in Malaysia, Messrs Jeff Leong, Poon & Wong to issue a letter of demand dated 30 June 2015 to the defendant at his residential addresses and business addresses to demand for the repayment of the sum due and owing.

[9] The defendant is stated to have failed, refused and or neglected to make the payment for the sum due and owing to the plaintiff. Hence, the present suit is filed before this court. The plaintiff, inter alia, claims for the following from the defendant:

(a) the sum due and owing of HKD19,184,360 (equivalent to RM10,078,637.81 based on the exchange rate of HKD100 to RM52,5357) as at 20 May 2016; and

(b) interest at the rate of 18%pa on the sum due and owing of HKD19,184,360 (equivalent to RM10,078,637.81 based on the exchange rate of HKD100 to RM52.5357 as at 20 May 2016) from 24 May 2014 until the date of full and final settlement of the sum due and owing by the defendant to the plaintiff.

THE DEFENDANT'S CONTENTION

[10] The key issue of contention by the defendant is that the plaintiff's claim is for money won by the plaintiff as a result of gambling activities at the plaintiff's casino, Wynn Resorts (Macau). It is the defendant's case that the plaintiff cannot claim for money won as a result of gambling activities as this is against the laws and or the public policy of Malaysia and that the plaintiff's pleaded cause of action (ie recovery of a loan) is actually false, craftily created to deceive the court.

[11] The defendant argued that in relying upon the statement of claim filed by the plaintiff in the Hong Kong's court, it clearly shows that the plaintiff is carrying on business as an operator of a casino and gaming resort in Macau and it is not into the business of granting monetary loans. The defendant submitted that he would not be travelling all the way to a casino in Macau to obtain a monetary loan from the plaintiff.

[12] Six factors were highlighted by the defendant where the plaintiff's claim is said to have been militated as being a loan recovery and that the six factors cumulatively proved that the plaintiff's claim is not a loan recovery. The factors are stated as follows:

(a) normal banks or financial institutions would not grant two large loans of HKD10m each based on half A4 size page documents, such as the plaintiff's alleged 'Credit Line Increase Request' dated 23 May 2014 and 24 May 2014;

(b) normal banks or financial institution would not process and approve two large loans of HKD10m each based on half A4 size page hand scribbled documents, as shown in the top part of exhibits marked 'WYL4' and WYL5';

(c) it is rather strange that on 19 May 2014 at 10.38:13 am, a large loan of HKD10m was allegedly approved ('WYL4'), and then within a very short time, on the same day at 10.38:41am, another large loan of HKD10m was allegedly granted ('WYL5'). The two loans were separated by a mere 28 seconds;

(d) there are serious discrepancies as to the dates, such as 19 May 2014 and 23 May 2014 on 'WYL4'; and 19 May 2014 and 25 May 2014 on 'WYL5', which would not usually occur in normal loans given by banks or financial institutions;

(e) normal banks or financial institutions would not process and approve two large loans of HKD10m each based allegedly on a telephone conversation ('WYL5') and an e mail ('WYL4') only. Usually clear written approvals based upon careful evaluations are required; and

(f) the plaintiff has never advertised or held itself out in Macau or anywhere else in the world as being a licensed bank or financial institution. In fact, the plaintiff is synonymous with, and famous for, gaming and gambling at its luxurious casinos.

[13] The defendant argues that contrary to what was stated by the plaintiff, no actual physical cash money, to the tune of HKD20m was ever given by the plaintiff to the defendant on 23 and 24 May 2014. In fact, according to the plaintiff in the present case, the plaintiff only issued 'dead chips' and allowed gambling to be done using the said 'dead chips' at the plaintiff's VIP room at Wynn Resorts (Macau). The 'dead chips' cannot be exchanged for cash, and it is not cash money. It has no 'legal tender' and not accepted by any third party. The 'dead chips' can only be used for one single purpose only, and that is, solely for gambling, and gambling at the plaintiff's casino only. The plaintiff's 'dead chips' cannot be used at any other casinos.

[14] The defendant highlighted to this court further that there are two defining characteristics in the present case which conclusively rule out that the plaintiff's claim is for the recovery of a monetary loan, namely:

(a) in a normal loan transaction, there is a definite lender and there is a definite borrower. The loan is given by the lender, and utilised by the borrower. The borrower is always the party who has to repay the loan. Whereas the lender is always the party who has to be repaid. There is always no change in the capacities of both the lender and the borrower throughout the loan tenure;

(b) in the current case, there can be a change in the characteristics of both the plaintiff and the defendant. The change of characteristic depends on the gambling outcome, and it changes by the minute until the gambling session ends. It is only when the plaintiff had won in gambling that the plaintiff is a creditor and is entitled to repayment. On the contrary, had the plaintiff lost in gambling, the plaintiff would become a debtor instead and the plaintiff is then liable to make payment. Therefore, a defining characteristic of the current case is that the plaintiff (had they lost in gambling) could be a debtor. No such change of characteristic can happen in a normal loan transaction; and

(c) in a normal loan transaction, for a facility of HKD20m, usually there must be adequate securities given in return, eg in the form of guarantees, charges on real properties, fixed and floating charges, memorandum of deposits, etc. Solicitors are normally involved in preparing a series of lengthy documents, and the process from loan application to approval would normally take days, if not, weeks.

[15] In addition thereto, the defendant submitted that curiously, in the present case, for a large sum of HKD20m, there were no other usual securities at all. No solicitors were involved. No comprehensive and lengthy documentations. The two alleged loans (HKD10m each) were both approved between one and the other in less than one minute. This according to the defendant is another defining characteristic that the present case is not actually a loan transaction.

[16] The defendant argued further that the terms 'front money' and 'commission' are commonly used in the gaming and gambling industries and not used by normal banks or financial institutions and if it is a loan transaction of HKD20m as pleaded, there would not be any 'front money'.

[17] The defendant then highlighted the various provisions of the Malaysian laws currently in force against gambling in Malaysia. The laws are as follows:

s 26(1), (2) and (4) of the Civil Law Act 1956;

s 31 of the Contracts Act 1950; A

s 5 of the Betting Act 1953;

s 5 of the Common Gaming Houses Act 1953; and

s 24(a), (b) and (e) of the Contracts Act 1950. B

[18] By highlighting the provisions of the law in the above, it is the defendant's contention that the plaintiff's claim won in a gambling transaction is against the public policy of Malaysia and that the plaintiff's alleged loan transaction is in actual fact and in the words of the defendant, a 'false pretence' C for hiding its illegal gambling activity and as such, the alleged loan contract is illegal and unlawful contract and therefore void.

[19] Contrary to what the plaintiff has averred in its affidavit, the defendant D contended that in actual fact the plaintiff knew the laws in Malaysia. According to the defendant, the most telling admission which showed that there is knowledge of jurisdictions where gambling debts are not legally enforceable (ie Malaysia) can be seen from a statement found in the plaintiff's annual report 2013 where it is stated that in the event the player does not reside in a E jurisdiction where gaming debts are legally enforceable, the plaintiff can attempt to assert jurisdiction over assets the player maintains in jurisdictions where gaming debts are recognised. As such the defendant contended that reasonable deduction can be made to the plaintiff's loan documentations in that they are designed and crafted specifically to avoid and/or to circumvent the F strict anti-gambling laws in Malaysia.

[20] It is the defendant's argument that the plaintiff's action is a feigned action and several authorities were cited amongst others *Rex v Weisz and another, ex parte Hector MacDonald LD* [1951] 2 KB 611; *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR 412; *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281; [1992] 1 CLJ Rep 173 (SC); and G *Wai Hin Tin Mining Co Ltd v Lee Chow Beng* [1968] 2 MLJ 251.

[21] In applying the ratio decidendi of the cases, inter alia, that no court H should lend its aid to a man who found his cause of action upon an immoral or an illegal act, the defendant argued that the plaintiff's action herein is illegal, a blatant abuse of the court's process and the plaintiff's solicitors may be cited for contempt. The defendant urged that the court must not hesitate to strike out I the plaintiff's claim based on the *ex turpi causa non oritur* action principle that no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated.

[22] It is the plaintiff's contention further that as the plaintiff had earlier initiated proceedings against the defendant in Macau and also in Hong Kong, the present suit in Malaysia tantamount to multiplicity proceedings. According to the defendant, the plaintiff's actions by shifting their claim progressively from Macau and then to Hong Kong and now to Malaysia is a clear attempt to forum shop. Such an action according to the defendant is also an abuse process of the court.

[23] According to the defendant further, the *forum conveniens* in this present matter would be Macau as the plaintiff in the 'Credit Agreement' dated 10 May 2013 has elected Macau courts to be the court where any cause of action related to the debt may be initiated.

[24] The defendant concluded by stating that this is a plain and obvious case for the plaintiff's claim to be struck out as the claim is said to be either 'scandalous, frivolous or vexatious and/or abuse of the court's process.

THE PLAINTIFF'S CONTENTION

[25] On the defendant's challenge to set aside the action premised on the jurisdictional grounds, the plaintiff submitted that the material before this court shows that the defendant resides in Kuala Lumpur. That alone according to the plaintiff, is sufficient to confer this court with jurisdiction to hear the matter pursuant to s 23(1)(b) of the Courts of Judicature Act 1964.

[26] In addition, from para 9 of the statement of claim and exh JMS2 of encl 17, the plaintiff highlighted that it can be discerned that the cause of action arose in Kuala Lumpur when the plaintiff's Kuala Lumpur solicitors demanded repayment of the loan/credit facility from the defendant in Kuala Lumpur and the refusal to pay was made by the defendant's Kuala Lumpur solicitors in Kuala Lumpur. The case of *Kie Gwan Shipping (M) Sdn Bhd v Federal Flour Mills Bhd* [1986] MLJU 1; [1988] 1 CLJ Rep 669 and *Chengdu Malaysia Education Consulting Service Pte Ltd v Twintech Holdings Sdn Bhd* [2015] MLJU 938; [2015] 1 LNS 205 are cited by the plaintiff to support this ground. Further, it is the plaintiff's submission that it is a fact that there is no agreement between the parties that any court outside Kuala Lumpur is to have exclusive jurisdiction.

[27] On the defendant's attempt to set aside/stay the action premised on forum non conveniens, the plaintiff submitted that the cause of action is in Kuala Lumpur and the defendant is a Malaysian citizen based in Kuala Lumpur. On top of that, the plaintiff submitted further that its witnesses are prepared to testify in Kuala Lumpur. As such, the plaintiff contended that it is

incorrect on the part of the defendant to state that this court is *forum non-conveniens*.

[28] On the striking out application by the defendant, the plaintiff submitted that this is not a plain and obvious case for striking out. According to the plaintiff, the defendant's contention that the loan/credit facility was for the defendant to gamble in the plaintiff's Macau casino and as gambling is illegal in Malaysia and as such the action herein must be struck down is misconceived given the decision of Eusoff Chin J (as His Lordship then was) in the *Aspinall Curzon Ltd v Khoo Teng Hock* [1991] 2 MLJ 484 where loans/credit given for gaming were held to be lawful, valid and enforceable.

[29] The plaintiff highlighted to the court two Singapore cases ie *Loh Chee Song v Liew Yong Chian* [1998] 2 SLR 641 and *Las Vegas Hilton Corporation (trading as Las Vegas Hilton) v Khoo Teng Hock Sunny* [1996] 2 SLR (R) 589 where the laws are very similar to that in Malaysia where loans/credit given for gaming were also held to be lawful, valid and enforceable.

[30] The plaintiff contended that this is not an action suing for gambling winnings or suing to enforce a wagering or gaming agreement/contract and that even if there is no valid contract between the plaintiff and defendant, the defendant is still obliged to pay the plaintiff for the benefit of the loan/credit facility given by the plaintiff and enjoyed by the defendant under the equitable concept of quasi-contract or the equitable rule against unjust enrichment which is not only recognised but enlarged by s 71 of the Contracts Act 1950. In support of the contention the plaintiff highlighted the cases of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 (PC) and *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229 in support of its contention. The plaintiff submitted that s 71 of the Contracts Act 1950 being a specific provision overrides whatever general provision there may be against the enforcement of a right such as that belonging to the plaintiff.

[31] It is the plaintiff's case that even if ultimately the court finds that the dealing between the plaintiff and the defendant is void, the plaintiff is still entitled to restitution under s 66 of the Contracts Act 1950 and as such encl 8 is untenable and that the plaintiff has a good claim filed in the appropriate court.

EVALUATION AND FINDINGS

[32] Before this court, we have a scenario where the defendant went to the plaintiff's establishment in Macau, wanted to gamble and took a loan/credit facilities and upon his request, the facilities was given in Macau where it is legitimate, valid and enforceable. Having enjoyed his game and having had the

full benefit of the facilities, the defendant now comes back to Malaysia and contested the payment demanded by the plaintiff. It is pertinent to note that the defendant never denied that he received the facilities. The plaintiff on the other hand filed this suit in this court to recover the sum owing under the facilities which the defendant utilised at the casino operated by the plaintiff in Macau.

[33] The credit documents executed by the defendant ie the credit agreement dated 10 May 2013, the credit line increase request dated 23 May 2014, credit line increase request dated 24 May 2014, the markers and the promissory note ('credit documents') are instruments creating a legitimate, valid, binding and enforceable debt under Macau law, the governing law of the contract between the plaintiff and the defendant. The existence of the contract is confirmed by the defendant himself.

[34] To start off, there are three things that this court must consider. Firstly, whether this court has jurisdiction to hear the matter and secondly, even if this court has, whether it is the appropriate forum and lastly whether the plaintiff's claim is a legitimate claim.

[35] Section 23 of the Courts of Judicature Act 1964 states:

> 23 Civil Jurisdiction — general
>
> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose, or
>
> (b) the defendant or one of several defendants resides or has his place of business, or
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
>
> (d) any land the ownership of which is disputed is situated,
>
> Within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

[36] In *Kie Guan Shipping (M) Sdn Bhd v Federal Flour Mills Bhd* the case cited by the plaintiff, the court held that the cause of action arose when the plaintiffs demanded payment of the credit notes from the defendants whose

office was in Kuala Lumpur and the refusal was made in Kuala Lumpur. The court ruled that the cause of action arose in Kuala Lumpur. In that case Abu Mansor Ali J (as he then was) stated at p 669 of the report as follows:

> In my view the cause of action in the present case is the debt created by the credit notes issued by the defendant company which had been assigned to the plaintiffs. For the definition of a debt *Stroud's Judicial Dictionary* at p 696 says: 'A debt is a sum payable in respect of a liquidated money demand recoverable by action' (*Rawley v Rawley* (1876) 1 QBD 460 see *Seldon v Wilde* [1910] 2 KB 9).

It cannot be denied, in my view, that in the present case the cause of action arose when the plaintiffs demanded the payment of the credit notes from the defendants whose office is in Kuala Lumpur and the refusal was done in Kuala Lumpur. I am quite clear that the cause of action of the present case arose in Kuala Lumpur.

[37] In *Chengdu Malaysia Education Consulting Service Pte Ltd v Twintech Holdings Sdn Bhd*, the plaintiff in that case is a company incorporated in the People's Republic of China and has a registered address in Chengdu, Sichuan Province, China. The defendant is a company incorporated in Malaysia. Both the plaintiff and defendant entered into an agreement where the plaintiff recruited students from China for them to further their studies at the defendant's establishment. The plaintiff then demanded for the refund of payment of fees collected and paid to the defendant. The court held that the High Court of Malaya has the jurisdiction to hear the matter. Her Ladyship Yeoh Wee Siam J found as follows:

> 17. It is observed that the agreements were executed in China, but that does not prevent this court from having jurisdiction over this action.
>
> 18. The civil jurisdiction of this court is provided in s 23(1) of the Courts of Judicature Act 1964 ('the CJA') as follows:
>
> Civil jurisdiction — general
>
> 23(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall

A have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

19. From s 23(1) of the CJA, it is clear that in the situations covered by paragraphs (a) to (d) of the same subsection, this Court has jurisdiction to try all civil proceedings.

20. As submitted by learned counsel for the plaintiff, the plaintiff's action meets more than one of the conditions put forward in s 23(1) of the CJA. The defendant is a company registered in Malaysia and has a place of business in Malaysia. The cause of action arose here ie, the defendant's refusal to return the overpayment to the plaintiff, to pay the student recruitment fees to the plaintiff, and to obtain accreditation from the Malaysian authorities (see *Malayan Banking Berhad v International Tin Council and another appeal* [1989] 3 MLJ 286; [1989] 1 CLJ Rep 87; [1989] 2 CLJ 961).

21. Therefore, I am of the view that the High Court in Malaya has jurisdiction over this action.

[38] The defendant in their reply submitted that *Kie Guan Shipping (M) Sdn Bhd v Federal Flour Mills Bhd* is not applicable in this case as it is not a case of illegality. This court is of the considered view that the argument is unacceptable as at this stage, what this court is looking at is the principle in determining where the cause of action arises. In *Kie Guan Shipping (M) Sdn Bhd v Federal Flour Mills Bhd*, the court has decided that if demand is made in Kuala Lumpur therefore the cause of action arose in Kuala Lumpur and that is what the present case is all about.

[39] The material before this court shows that the defendant resides in Kuala Lumpur. The cause of action therefore arose when the plaintiff through its solicitors in Kuala Lumpur demanded for the repayment of the loan/credit facilities from the defendant in Kuala Lumpur and the refusal on the part of the defendant to make such payment was also in Kuala Lumpur and as such this court is seized with the jurisdiction to hear this matter.

[40] The defendant further argued that the clause in the credit agreement dated 10 May 2013 (exh WYL3) has selected the jurisdiction of the Macau courts pursuant to the following clause:

(iv) Wynn Macau, in its sole and exclusive discretion, may initiate or bring any cause of action, whether civil, criminal or otherwise, related to ... the debt associated therewith, ... in any court in Macau SAR, accordingly.

[41] It is of the considered view that the said clause referred to by the defendant gives the discretion to the plaintiff to file a suit in Macau. Reading the clause would also mean that the plaintiff has discretion to choose not to

exercise it if it wishes as the plaintiff in this case has decided to initiate the cause of action in Kuala Lumpur. The said clause does not state that it is mandatory for the action to be filed in Macau. No exclusive jurisdiction is conferred by the said clause.

[42] In *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322, there was an exclusive clause as to jurisdiction. Nonetheless, the Court of Appeal found that the learned High Court judge was not in error when he found that as the plaintiff will have some difficulties in enforcing a judgment obtained in Japan and further as there was also a confusion as to whether the Hague Rules or the Hague-Visby Rules apply in Japan to determine the limit of liability and as such the matter could and would be more appropriately dealt with here in Malaysia than in Japan. Gopal Sri Ram JCA (as he then was) stated at pp 337–338 of the report as follows:

> *Forum selection and forum non conveniens*
>
> It is now necessary to deal with the differences that exist between applications based on the doctrine of forum non conveniens and those based on forum selection clauses
>
> I begin by recognising that the law has not yet reached the stage where uniform principles are to be applied to both types of cases. And I do not regard the decision of the Federal Court in American Express as having created such an inroad into this area of the law where both principle and authority tell against the unification of approach (see *Trendtex Trading Corporation and another v Créit Suisse* [1980] 3 All ER 721; [1982] AC 679 (HL)).
>
> In the former, proceedings are properly commenced in this country. The defendant then applies to stay them on the ground that there exists elsewhere a forum that is more convenient to adjudicate upon the dispute. The burden is therefore on the defendant to demonstrate why the suit should not proceed to disposal in the place where it has been commenced.
>
> In the latter, the plaintiff brings an action here in breach of an agreement to resolve the dispute in a foreign tribunal. The court is, of course, not bound to give effect to such an agreement. A forum selection agreement is to be treated upon the same footing as an agreement that confers jurisdiction. Since consent cannot create or confer jurisdiction upon a court that has none, it also cannot oust the jurisdiction that is properly seised of litigation. I draw support for this view from the judgment of Lord Denning in *The Fehmarn* [1958] 1 All ER 333; [1958] 1 WLR 159. Although that judgment has been criticized by academicians (see the articles in (1958) 7 ICLQ 599 and (1977) 26 ICLQ 825 at p 851) and by counsel for the appellant before us, I respectfully agree with the views expressed by Lord Denning and gratefully adopt them as my own.
>
> Having said all that, once the defendant invokes the agreement, the burden is on the plaintiff to show why the agreement should not be honoured. But there the difference ends. For, the matters that are relevant to the exercise of discretion in both

cases are almost identical. This is well illustrated by *The Frank Pais* [1986] 1 Lloyd's Rep 529.

That was a case where an application was made to stay an action on two grounds. The first was based on a clause in the bill of lading which, inter alia, required all disputes to be decided in the country where the carrier (the defendant in that case) had his principal place of business. The defendant in that case had his principal place of business in Havana, Cuba. The second ground was that England was forum non conveniens. Sheen J rejected the argument mounted on the contractual provision and in doing so he applied the statement of the law in *Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria* [1981] 2 Lloyd's Rep 119. This is what he said:

> The defendants move the court for a stay on the alternative ground of 'forum non conveniens'. The matters which have to be considered by the court when exercising its discretion whether to give effect to an agreement to refer disputes to a foreign court include those matters which are relevant to an application to stay on this alternative ground of forum non conveniens. As the plaintiffs have discharged the burden of showing strong grounds why I should not grant a stay of this action despite the agreement that any dispute should be decided in Cuba, it follows that the defendants would be unable to discharge the burden upon them of showing that, in the absence of such an agreement, this action ought to be stayed.

In the present state of the law, I am unable to say that the approach adopted by Sheen J is wrong.

The present appeal

That brings me to the present appeal.

In my judgment, the learned judge has committed no error in the way in which he stated the law. He took into account the fact that the vessel and the appellant are both Malaysian. The cargo was loaded at a Malaysian port. The evidence is admittedly both here and in Manila. But the judge took this into account and came to the conclusion that trial in this country will be less expensive and more convenient. His judgment discloses that he was conscious of the burden on the respondent to produce strong grounds to displace the forum that had been selected. He asked himself all the right questions and, acting in obedience to binding precedent, came to the conclusion that there ought not to be a stay.

In these circumstances, we were satisfied that this is not a case for appellate interference. We therefore dismissed the appeal and made those consequential orders that usually follow a dismissal.

[43] In *The Atlantic Star: The owners of the Atlantic Star v The owners of the Bona Spes* [1973] 2 ALL ER 175 the House of Lords held that the discretion to grant a stay was to be exercised by taking into account the following:

(a) any advantage to the plaintiff; and

(b) any disadvantage to the defendant.

[44] The court also cautioned that a foreign plaintiff was not lightly to be refused the right to sue in an English court if jurisdiction had been properly founded. The court further held that the advantage to the plaintiff in allowing the suit to proceed had to be substantial and not merely fanciful. On the other hand, the disadvantage to the defendant had to be even more substantial to justify a stay of the action.

[45] The court in *The Atlantic Star: The owners of the Atlantic Star v The owners of the Bona Spes* further held as follows:

> They (authorities) support the general proposition that a foreign plaintiff, who can establish jurisdiction against a foreign defendant by any method recognised by English law, is entitled to pursue his action in the English courts if he is genuinely thinks that will be to his advantage and is not acting merely vexatiously. Neither the parties nor the subject-matter of the action need have any connection with England. There may be proceedings on the same subject matter in a foreign court. It may be far more appropriate forum. The defendant may have to suffer great expense and inconvenience in coming here. In the end the decisions of the English and foreign courts may conflict. But nevertheless, the plaintiff has the right to obtain the decision of the English court.

[46] The defendant's contention that this court is *forum non conveniens* is untenable because in this present case, the cause of action arose in Kuala Lumpur, the plaintiff has affirmed the affidavit stating that the witnesses are prepared to testify in Kuala Lumpur, there is no agreement that any court outside Kuala Lumpur has exclusive jurisdiction and the fact that the plaintiff will have difficulty in enforcing the judgment in this country as Macau is not listed under the Reciprocal Enforcement of Judgments Act 1958. As stated by the Court of Appeal in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong*, even with the exclusive jurisdiction clause, the parties' agreement cannot oust the court's jurisdiction. It is up to the court to decide whether to decline such jurisdiction. The question of the court not having jurisdiction does not arise.

[47] Further, it has been revealed that the writ issued by the Hong Kong court had expired and there has been no service of legal process insofar as the Macau action is concerned. As such, this court is more accessible to the plaintiff given that the defendant is resident within the jurisdiction of this court. In contrast, there is no substantial disadvantage to the defendant if this court is to exercise its jurisdiction in this case when such jurisdiction is properly founded pursuant to s 23(1)(a) and (b) of the Courts of Judicature Act 1964.

[48] There can be no multiplicity of proceedings as well as the Hong Kong and Macau actions have not been proceeded with nor heard, let alone adjudicated. The only underlying mischief that one wants to rectify in respect

of multiplicity is when there is more than one court deciding on the same matter. It will not happen in this case because as stated in the above, the Hong Kong writ and the Macau actions have been comatose. The only action is before this court now and there is no possibility that the action herein will be overtaken by rulings in the inactive Hong Kong and Macau actions.

[49] Moving on, the law in respect of striking out is clear and settled. Actions will only be struck out in plain and obvious cases (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC)). The power to dismiss an action summarily without permitting a plaintiff to proceed further is a drastic power and should be exercised with utmost caution. The power to strike out an action being draconian, the court should not exercise this power too readily unless it is convinced that the plaintiff's case is wholly devoid of merit. This court is reminded of the approach founded on judicial policy to afford a litigant an opportunity or a right to institute a bona fide claim before the courts and whenever possible, the courts will permit the plaintiff to proceed with the action.

[50] As stated earlier, the defendant's main contention is that the loan/credit facility was for the defendant to gamble in the plaintiff's Macau casino and as gambling is illegal in Malaysia, the plaintiff's action must be struck down.

[51] This court is of the considered view that at this stage it cannot decide under O 18 r 19(1) of the ROC whether the plaintiff's claim is legitimate or otherwise. This is definitely not a plain and obvious case to be struck out and this court must go to the distance and make the ultimate findings at the end of a full trial after hearing evidence and more thorough analysis of the law. Further, this court finds that the plaintiff is not in a position bereft of support of the law. The plaintiff forwarded a local case and two Singapore court's decisions which referred to the English position which suggest that a loan for gambling is a legal contract and enforceable.

[52] In *The Aspinal Curzon Ltd v Khoo Teng Hock* [1991] 2 MLJ 484, Eusoff Chin J (as he then was) discussed the law and gave his reasoning quite in detail. In this case, the plaintiff a Iicensed gambling casino, obtained in the High Court of England a judgment against the defendant and subsequently applied to the High Court in Kuala Lumpur to have the judgment registered under s 4 of the Reciprocal Enforcement of Judgments Act 1958. The application was granted by the senior assistant registrar and the defendant's application to set aside the order was dismissed. On appeal, the defendant in that case argued that the cheques given to the plaintiff (in exchange for cash and gaming chips) were given for illegal consideration, or alternatively that the judgment was for gambling debt, and should not be enforced, as it is against the public policy of this country, and that the contract was in contravention of some essential

principles of justice or morality. Sections 24 and 31 of the Contracts Act 1950, s 26 of the Civil Law Act 1956 and s 5 of the Reciprocal Enforcement of Judgments Act 1958 were cited.

[53] Learned counsel for the plaintiff in that case on the other hand argued that even if the judgment was for a gambling debt, the gambling took place in The Aspinall Curzon which was a gambling casino licensed under the Gaming Act 1968 [UK]. In Malaysia too, the Finance Minister under s 27A of the Common Gaming Houses Act 1953 may by licence authorise the promotion and organisation of gaming by a local company. A number of companies have been issued such licences in Malaysia. Section 27A of the Common Gaming Houses Act 1953 states:

> (1) Notwithstanding this Act or the Betting Act, 1953 or any other law relating to gaming, betting or lotteries, the Minister of Finance may, in his discretion, by licence authorise a company registered under the Companies Act, 1965, other than a foreign company as defined in subsection (1) of section 4 of the Act, to promote and organise gaming —
>
> (a) in respect of such game or games;
>
> (b) on such premises;
>
> (c) subject to the payment of such fees and duties;
>
> (d) subject to such other terms and conditions.

[54] Eusoff Chin J (as he then was) states that the court agreed with learned counsel for the plaintiff that had the contract been entered in this country it had been so executed with lawful consideration, and s 24 of the Contracts Act 1950 cannot apply to make it void. His Lordship (as he then was) elaborated as follows:

> The provisions of s 31 of the Contracts Act 1950 and s 26 of the Civil Law Act 1956 are not meant to apply to gaming or wagering in any premises run by a company licensed by the Finance Minister under s 27A of the Common Gaming Houses Act 1953.
>
> In *Saxby v Fulton* [1909] 2 KB 208, the issue was whether money lent for the purpose of gaming was recoverable in England although the loan was made in a foreign country (France) where gaming was not illegal by the law of that country. The Court of Appeal held that the contract being legal in the law of the country where it was made, it was enforceable in the English courts unless its enforcement would be contrary to public policy, public morality or natural justice.
>
> The argument of the defendant's learned counsel is that the enforcement of this foreign judgment is against public policy. But what is public policy? In *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, Burrough J protested against arguing too much upon public policy. It is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but only when other points fail.

In *Naylor Benzon & Co Ltd v Krainische Industrie Gesellschaft* [1918] 1 KB 331, McCardie J at p 342 stated:

> But the courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application. In *Janson v Driefontein Consolidated Mines* [1902] AC 484, Lord Halsbury LC said: 'I deny that any court can invent a new head of public policy'. I very respectfully doubt if this dictum be consistent with the history of our law or with many modern decisions. In *Wilson v Carnley* [1908] 1 KB 729 the Court of Appeal held that a promise of marriage made by a man who to the knowledge of the promisee was at the time of making the promise married is void as being against public policy. This decision marked a new application or head of public policy. In *Neville v Dominion of Canada News Co* [1915] 3 KB 556 the Court of Appeal held, affirming Atkin J, that an agreement by a journalist not to comment upon the plaintiffs' company or its directors or business was void as against public policy. This decision created, I think, a wholly new head of public policy. In *Horwood v Millar's Timber and Trading Co* [1917] 1 KB 305 the Court of Appeal held that an agreement which unduly fettered a man's liberty of action and the free disposal of his property was void as against public policy. This decision also, I think, created in substance a new head of public policy. The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time.

In *Egerton v Brownlow (Earl)* (1853) 4 HL Cas 1, Lord Truro, at p 196 stated:

> Exceptions have been made to the expression of 'public policy', and it has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign states; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

In the case before me, the cheques were issued in exchange for cash and gaming chips for purposes of gaming at a licensed gaming casino. It is not for an unlawful purpose by the law of England. On the facts of the case, had such transaction occurred in this country, it is a lawful transaction provided that the gaming is done in gaming premises licensed by the Finance Minister under s 27A of the Common Gaming Houses Act 1953. The enforcement of the UK judgment cannot be considered as against the public policy of this country.

[55] The defendant sought to rely on s 5 of the Betting Act 1953 and s 5 of the Common Gaming Houses Act 1953, in arguing that the plaintiff's loan is illegal in nature. These are penal statutes which aim to control common betting and gaming houses in the territory of Malaysia which are not licensed under s 27A of the Common Gaming Houses Act 1953. The casino in question in which the loan was granted to the defendant is a duly licensed outlet operating in Macau. As such the said provisions relied on by the defendant have no

application on any business conducted by the plaintiff legally out of Malaysia nor on the loan in question.

[56] The defendant argued that *Aspinall Curzon Ltd v Khoo Teng Hock* is a case involving enforcement of registration of foreign judgment and therefore it is irrelevant. The defendant further argued that in this present case even if it is not a gaming contract, it is a loan for gambling. The defendant is definitely extending the parameters but when it comes to the *Aspinall Curzon Ltd v Khoo Teng Hock* decision, where reasoning is given as to the gambling debt or money lent for the purpose of gaming and the legality of the money lent, the defendant puts a stop to it by submitting that that case is not relevant as it is about enforcement of registration of foreign judgment. In any event, and as quoted in the above, the reasoning as to the loan for gambling was alluded to clearly in *Aspinall Curzon Ltd v Khoo Teng Hock*.

[57] In Singapore, where the laws are very similar to that in Malaysia (s 6 of the Singapore Civil Law Act is similar with our s 26 of the Civil Law Act 1956), loans and/credit given for gaming were also held to be lawful, valid and enforceable. In *Loh Chee Song v Liew Yong Chian* [1998] 2 SLR 641 the court held as follows:

> (3) Sections 6(1) and 6(2) of the Civil Law Act (Cap 43, 1994 Ed) nullified any gaming or wagering contracts and any prize won could not be recovered with the assistance of the court. These provisions did not nullify loans made for the purpose of gaming and wagering. Whether common law or public policy rendered such loan contracts unenforceable was a separate question and was extraneous of s 6.

[58] The High Court in that case at p 300 of the report elaborated further:

> [5] The third defence was based on public policy, namely that the loans were irrecoverable because they were made for the purposes of enabling the defendant to participate in unlawful gambling. Counsel submitted that s 6 of the Civil Law Act (Cap 43, 1994 Ed) applied because gambling on board the cruise ships was illegal by virtue of the Common Gaming Houses Act (Cap 49). He argued that since gambling in a casino would have offended the Common Gaming Houses Act, it would be against public policy to let a person recover a loan made for the purposes of gaming in contravention of the Act. I shall revert to this defence shortly. First I shall deal with the reference to s 6 of the Civil Law Act because in my view, it was a point made totally off the mark. The relevant portion of s 6 provides as follows:
>
> (1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void.
>
> (2) No action shall be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.

A

(3) Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2), or to pay any sum of money by way of commission, fee, reward or otherwise in respect of such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

B

[6] Subsections (1) and (2) nullify any gaming or wagering contract and any prize won cannot be recovered with the assistance of the court. These provisions do not nullify loans made for the purposes of gaming or wagering. The two are distinct transactions. If A lends money to B who used it to lay a wager with C, the contract between B and C is affected by s 6, but not the contract between A and B. Whether common law or public policy would render the contract between A and B unenforceable is a separate question and is extraneous of s 6 of the Civil Law Act.

C

D

[59] In *Las Vegas Hilton Corporation (trading as Las Vegas Hilton) v Khoo Teng Hock Sunny* [1996] 2 SLR (R) 589 the High Court held that it is not against the public policy of Singapore to enforce a contract of loan that was valid under its proper law and for the purpose of gambling legally at a foreign casino. Gaming at common law and in Singapore was held to be not illegal per se and that s 6 of the Civil Law Act merely provided that wagering contracts were void, and a party could not sue on it or to recover any wagering prize. Choa Hick Tin J discussed as follows:

E

Is the contract enforceable in Singapore?

F

[51] Following from my findings above that the contract was made in Las Vegas and that the proper law of the contract is Nevada law, the next issue is whether the contract may be enforced in Singapore. This same issue will also arise even in the alternative scenario: contract was made in Singapore (though not found by me to be the case) with Nevada law being the proper law.

G

[52] Section 6 of our Civil Law Act provides:

(1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void.

H

(2) No action shall be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.

I

[53] The defendant argued that gaming is objectionable and a contract to game offends public policy. He referred to the fact that there is no casino in Singapore to substantiate that contention. Again he tried to gloss over the gaming activities at the Turf Club by saying that the profits earned are for charitable purposes. There are also other forms of public gaming in Singapore — the Big Sweep, the Toto draw and the 4-D. From time to time other organizations or bodies have also been granted permission by the authorities to organise draws.

[54] At common law gaming is not per se illegal; neither is borrowing or lending money for gaming immoral or unlawful at common law. Section 6 does not render gambling illegal. All that it says is that a wagering contract is void and you cannot sue on it; neither can you sue to recover any wagering prize. However, the Legislature has intervened and rendered certain forms of gambling illegal by enacting the Betting Act and the Common Gaming Houses Act. The former seeks to suppress common betting-houses, betting in public places and bookmaking and it deems a common betting-house to be a common nuisance and contrary to law; the latter seeks to suppress common gaming houses, public gaming and public lotteries and it declares every common gaming house to be a common and public nuisance contrary to law. However, in both Acts, powers are given to the minister to grant exemptions.

[55] The fact that if the present contract between the parties had been governed by Singapore law the contract could be invalid or void (under s 6 of the Civil Law Act) does not mean that it, being governed by Nevada law and valid under that law, may not be enforced in Singapore. In Dicey and Morris, the authors state at p 1227:

> Not only have foreign contracts been enforced by English courts in circumstances in which they would have been void under an English statute, if English law had applied, but contracts subject to foreign law have also been held valid, although they ran counter to a principle of the common law.

The only exception, as the authors noted, is 'if the court regards a common law principle as one expressing a basic public policy, will it enforce it in a case in which otherwise foreign law applies.

[56] At Rule 202 Dicey and Morris states the following as regards wagering contracts:

(1) A wagering contract which is valid by its proper law is valid in England, but no action lies in England to recover any money won on such a contract.

(2) A cheque drawn on an English bank and given by way of security for money won by gaming or betting on games, or for money lent for gaming or betting, is deemed to have been given for an illegal consideration. Hence an action in England on the cheque will fail, unless it has been negotiated to a holder in due course.

(3) But an action on the loan itself will succeed if the loan is valid by its proper law.

[57] The authors then went on to state three principles upon which the statements in Rule 202 are based:

(1) An English statute which makes wagering contracts void applies only to contracts the proper law of which is English law.

(2) An English statute which makes wagering contracts unenforceable, ie forbids the bringing of an action on the contract, applies to all actions brought in an English court on wagering contracts, irrespective of their proper law.

(3) English law governs the validity of a negotiable instrument, ie a cheque, payable in England but issued or negotiated by way of conditional payment of, or security for, a debt arising from a foreign wagering contract.

In 8 *Halsbury's Laws of England* (4th Ed) para 607 a similar statement of the law appears:

> A contract good by its proper law which would be void, rather than illegal, in England will be enforced in England. Thus a loan advanced for the purpose of gaming in a foreign country where gaming is not illegal may be recovered by action in this country; but an action on a cheque payable in England and given for money so lent will not succeed, as in that case the transaction is governed by English law. (Emphasis added.)

[58] One of the earliest cases on point is *Quarrier v Colston* (1842) 1 Ph 146 where the Lord Chancellor, on an appeal, held that money lent for the purpose of gambling in Germany where the games in question were not illegal, could be recovered in an English court.

[59] *Quarrier v Colston* was applied in *Saxby v Fulton* [1909] 2 KB 208 where the plaintiff sought to recover from the executrix of a solicitor the money which the plaintiff had loaned to the solicitor at Monte Carlo for gambling there. At first instance, Bray J held that he was bound by the Court of Appeal decision in *Quarrier v Colston*, and with which he agreed, and held the money to be recoverable notwithstanding the enactments of the intervening Gaming Acts (in some respects similar to s 6 of our Civil Law Act). On appeal the decision of Bray J was upheld. Vaughan Williams LJ, after noting that the case was not distinguishable from *Quarrier v Colston*, and after reviewing some of the post Quarrier cases, did not think that it would be possible to assume that there was any general principle of public policy which would compel the court to hold that the recovery of money lent for the purpose of gambling abroad was forbidden by the statute law of England. He said that, 'English courts can only refuse to allow the recovery of such money where it has been lent for a purpose contrary not only to the statutes of this country, but contrary also to the basis of morality which, irrespective of the statute law, is assumed to prevail in this country'.

[60] Kennedy LJ, in dealing with the question whether the Gaming Acts affect morality, said at p 232:

> It is suggested that morality is advancing, and that this is evidenced so far as to create a public policy by statutes which have been passed for the purpose of making some gambling transactions unlawful; but the answer is that these statutes really shew that the policy of the legislature is to deal in a disciplinary fashion with certain particular manifestations of the gambling spirit, and do not establish a public policy which is contravened by any transaction connected with betting or games of chance. Reference was made to the more recent statutes of 1845 and 1892; but they relate to actual gaming transactions, and not to claims for repayment of money lent.

...

[63] The decisions in *Quarrier v Colston* and *Saxby v Fulton* were followed and

Moulin v Owen distinguished in Societe Anonyme Des *Grands Etablissements Du Touquet Paris-Plage v Baumgart* [1927] TLR 278 where Shearman J held that where persons lent money to another for the purpose of paying debt incurred in a foreign country in playing games which were not illegal by the law of that country, but would have been illegal if played in England, and received a cheque for the amount, though the lenders could not sue upon the cheque in England, they could sue in England upon the consideration.

[64] *Quarrier v Colston* was applied in a local case *D'Almeida v D'Menzies* (1886) 5 SSLR 126, where the plaintiff, a resident in Singapore, having purchased some Manila lottery tickets from agents in Manila, sold a portion to the defendant, also a resident here. The defendant refused to pay for them on the grounds (i) the contract being in violation of the provisions of the Gambling Ordinance 1879 was illegal and void; and (ii) the contract was void for being against public policy. Ford CJ held that the transaction did not infringe the Gambling Ordinance 1879. He also held that as the lottery was legal in Manila, it was not against public policy to enforce the contract. He found that in substance the transaction here was the same as that in *Quarrier v Colsto*:

> The contract here will, I think, be simply and accurately put in this form. In consideration of A giving to B a ticket which shall enable B to gamble by taking his place in a lottery where lotteries are lawful, B agrees to pay A a certain sum for the ticket, the transactions mutatis mutandis are in substance the same; if A had lent the money to B to buy the lottery ticket, the facts would be in form identical with the two cases to which I have referred, and he must have recovered. But in what does the transaction differ? In substance in no way; in form only in this way that A has shortened the process by selling a ticket to B upon credit instead of obliging B to procure it with money lent by A.

[65] Reverting to the instant case, gambling per se is not illegal in Singapore. The Betting Act and the Common Gaming Houses Act only seek to control and illegalize certain forms of gambling. I have earlier referred to a number of forms of gaming activities which the public may participate in Singapore. *If gaming is so fundamentally wrong, or is immoral, such that there is a public policy against it, then I would have thought there would have been a general ban on gambling, whatsoever the form or manifestation without exceptions and for whatever the ends. If an activity is so bad as to offend a basic moral norm of society, that activity cannot be rendered any less offensive merely because the proceeds of that activity will be applied for a public purpose.*

[66] As stated in *Cheshire & North on Private International Law* (11th Ed) at p 131: 'a transaction that is valid by its foreign lex causae shall not be nullified on this ground (public policy) unless its enforcement could offend some moral, social or economic principle so sacrosanct in English eyes as to require its maintenance at all costs and without exception'.

[67] Accordingly, and in the light of the authorities above, I hold that it is not against public policy of Singapore to allow the plaintiffs to recover the loans they gave to the defendant to enable him to gamble legally at their casino at Las Vegas. (Emphasis added.)

[60] Reverting to the present case, the plaintiff had averred in its affidavit that this is not an action suing for gambling winnings or suing to enforce a wagering or gaming agreement/contract. What is pertinent to highlight as well is the fact that in the loan agreement, the defendant has acknowledged that there is a loan. This, the court finds is an admission. In the credit agreement, it is stated:

> I (the defendant) agree that each draw against any credit line is a separate advance money by Wynn Macau (the plaintiff).

[61] It is also stated in the credit agreement signed by the defendant that:

> ... I (the defendant) have the intent to legally repay any advance of money by Wynn Macau (the plaintiff).

[62] The above written admissions of the loan/advance of money in the credit documents executed between the parties which is now being contested by the defendant involves consideration of s 91 of the Evidence Act 1950 which states:

> 91 Evidence of terms and contracts, grants and other dispositions of property reduced to form of document.
>
> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

[63] So here in the present case, there is a written admission that there is a loan enforceable under the Macau law and there is a written agreement. The law on admission is settled in that admissions form the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission (*The Hongkong & Shanghai Banking Corporation Limited v Tan Sock Gin* [1999] MLJU 406; [1999] 7 CLJ 450). Nonetheless, this is not the stage for the court to decide and as such the plaintiff's case must be heard fully and to be decided thereafter. This court has to add that in this case, a Macau lawyer by the name of Vitor Gomes, has affirmed an affidavit and averred that this is not a gaming/wagering contract but instead a loan pursuant to the Macau laws. The Macau laws recognise the transaction as credit transaction. The defendant can bring their expert to say otherwise. This issue alone takes away the quality of a plain and obvious case.

[64] In arguing that the facility/loan granted is in fact 'gambling winning', the defendant has few authorities on the subject matter. As highlighted by the

plaintiff, these authorities are distinguishable on the facts and the law with that of the plaintiff's claim against the defendant herein:

(a) *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558 — a case concerning the legality of payments towards gaming losses made to a casino by a gambler who embezzled the funds belonging to the plaintiff company and whether the casino holds the funds on constructive trust for the said plaintiff;

(b) (i) *Jupiters Limited (trading as Conrad International Treasury Casino) v Lim Kin Tong* [2005] MLJU 534; [2006] 5 CLJ 277;

(ii) *Star City Pty Ltd (formerly known as Sydney Harbour Casino Pty Ltd v Tan Hong Woon)* [2002] 1 SLR (R) 306; and

(iii) *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548.

— The above are cases in which the casino sought to recover its gaming winnings against the gambler when the gambler's cheques issued as payment for gaming chips were dishonoured when presented for payment at a later date (as opposed to a pure credit facility granted to the gambler without any tendering of money or money's worth required from the gambler as guarantee in advance to secure gaming winnings by the casino);

(c) (i) *Jupiters Ltd (trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor* [2007] 7 MLJ 228; [2008] 7 CLJ 715; and

(ii) *Hill v William Hill (Park Lane) LD* [1949] AC 530.

— The above are cases in which the casino brought an action against the gambler for dishonoured cheques issued as payment for gaming losses;

(d) *CHT Ltd v Ward* [1965] 2 QB 63 — a case in which the casino sought to recover gambling winnings when the gambler's account with the casino was in the red;

(e) *Sun Cruises Ltd v Overseas Union Bank Ltd* [1999] 2 SLR (R) 611 — a case concerning the legality of the cashier's order tendered by the gambler as security for payment of gambling losses prior to being allowed to gamble at a casino and the gambler's bank's obligation to honour the said cashier's order; and

(f) *Quek Chiau Beng v Phua Swee Pah Jimmy* [2001] 1 SLR 762; [2000] 3 SLR (R) 761 — this is a claim brought by a junket providing credit to the gambler to gamble at a casino where there was a disagreement between the junket and the gambler on the amount of debt. The Singapore High Court dismissed the junket's application for summary judgment and granted the gambler unconditional leave to defend the suit brought against him.

[65] It is the observation of this court that the authorities cited by the defendant in the above are cases which were decided after a trial.

[66] Moving on, the plaintiff submitted that even there is no valid contract between the plaintiff and the defendant, the defendant is obliged to pay the plaintiff for the benefit of the loan/credit facility given by the plaintiff and enjoyed by the defendant under the equitable concept of quasi-contract or the equitable rule against unjust enrichment which is not only recognised but enlarged by s 71 of the Contracts Act 1950. Chapter 23 in *Cheshire, Fifoot and Furmston's Law of Contract*, Singapore and Malaysia Edition, by Andrew Phang was highlighted to this court where the author explains the principle of unjust benefit or unjust enrichment at p 943 as follows:

> This principle 'presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expenses; and thirdly, that it would be unjust to allow him to retain the benefit'.

[67] The same author in the same chapter further states that:

> In 1931 Professor Winfield defined 'genuine' quasi-contract as 'liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit.

[68] The learned author then stated that the provisions of s 71 of the Contracts Act 1950 relates directly to quasi-contractual recovery. Section 71 of the Contracts Act 1950 states:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered.

[69] Gunn Chit Tuan J (as he then was) in *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1987] 2 MLJ 57 held that the principle of unjust enrichment was in effect the basis of ss 69 and 70 of the Indian Contract Act 1872 (in pari materia with our ss 70 and 71 of the Contracts Act 1950) and these sections were said to be wider in scope than the principle as applied in England.

[70] To satisfy the requirement of s 71 of the Contracts Act 1950, the loan credit facility given by the plaintiff:

(a) must be lawful;

(b) must be for another person

(c) must not be intended to be given gratuitously; and

(d) must be such that the other person enjoys the benefit of such facility. A

[71] The material before this court at this juncture shows that the loan/credit facility given by the plaintiff to the defendant is lawful because it was given in Macau as permitted by and under the law of Macau. There is no doubt that the facility was given to the defendant. From the affidavits of the plaintiff, there is no doubt that the facility was not and is not intended to be given gratuitously and the defendant never denied that he had taken the benefit of the plaintiff's facility. Further, the plaintiff's submission that the fact the defendant went to Macau, obtained a huge facility, gambled away and comes back to Malaysia and cloaks himself by saying 'no you can't touch me, I am in the safe haven of Malaysia' is the kind of inequitable conduct which equity would prevent under the concept of unjust enrichment and s 71 of the Contracts Act 1950 is not devoid of merit. B C D

[72] The plaintiff then cited a few cases where s 71 of the Contracts Act 1950 has been liberally applied. The cases and the summary are as follows:

(a) in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 (PC), there was a series of subcontract after subcontract and the Privy Council acknowledged that the last person in that chain can sue the first person in the chain under s 71 so long as the four conditions have been met even though there was no privity of contract; E

(b) in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Ors* [1990] MLJU 1; [1991] 1 CLJ 776, the court in dismissing an application by the defendants concerned to strike out the plaintiff's claim held that the claim is sustainable under s 71 even though on the facts of the case it would seem that whatever the plaintiff did had only benefitted the pertinent defendants indirectly; F G

(c) in *Kuan Leong Hin v The State of Johore* [1941] 1 MLJ 231*, the court held that* s 71 (then known as s 70 of the Contract Enactment) would apply even though there was no way for the defendant to escape from or refuse the enjoyment of the benefit; and

(d) in *The Perak Iron Mining Co Ltd v Chong Voon Kim* [1962] 1 MLJ 270 (CA), the Court of Appeal held that even if a third party is responsible for the plaintiff's claim, or payment to the plaintiff is dependent on the third party doing the needful and the third party does not do so, that is no excuse for the defendant to escape from s 71, and that it is for the defendant to claim against the third party. H I

[73] It is to be noted that equitable principles like the doctrine of estoppel as well as the equitable principles underlying s 71 of the Contracts Act 1950 have

never been addressed in any of the authorities relied upon by the defendant. Perhaps, this is the first case where s 71 of the Contracts Act 1950 will be used in the context of gambling.

[74] The plaintiff's argued that this is a case where the defendant, a Malaysian said to have improper intentions at the outset ie to obtain from an unknowing and unsuspecting the plaintiff the loan with a premeditated intention of dishonouring his payment obligations by arguing that Malaysian legal strictures and public policy when repayment of the loan falls due and that based on the doctrine of estoppel and operation of the maxim 'equity will not permit statute to be used as an engine of fraud', the defendant's unconscionable conduct therefore ought not to be condoned in the interest of justice and equity. This court is of the considered view that the plaintiff must be allowed to ventilate this point and not dismiss it summarily.

[75] On the issue of s 71 of the Contracts Act 1950, the defendant contended that the plaintiff cannot rely on the section as it is not pleaded by the plaintiff. This court is of the considered view that as a court of justice technical niceties like the need to plead certain matters can be overlooked as demonstrated in the case of *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229. In that case, Abdul Malik Ishak J states at pp 246–247 as follows:

> By way of an addendum, I feel constrained to say something of s 71 of the 1950 Act. That section is worded in this way:
>
> > Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered and it is in pari materia with s 70 of the Indian Contracts Act. Section 71 of the 1950 Act is all encompassing. It enables a person who actually supplies goods or renders some service not intending to do so gratuitously to claim compensation from the person who enjoys the benefit of the supply made or the services rendered. The payment of RM126,000 for the Immigration Department certainly benefitted the appellant and this must have prompted the trial court to invoke s 71 of the 1950 Act vigorously. I am constrained to say that that section embodies the equitable principle of restitution and the prevention of unjust enrichment and it seems that the government is also bound by it (*State of UP v Chandra Gupta & Co* AIR 1977 All 28 at p 33; and *State of West Bengal v BK Mondal and sons* 1962 SCR Supl (1) 876; [1962] AIR 779). Restitution seems to have been engrafted into our Contracts Act by the draftsmen and it is a cause of action which should have been embodied in the respondent's statement of claim but the failure to do so would not be fatal (*Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor* [1992] 1 MLJ 166 where s 71 of the 1950 Act was not pleaded but His Lordship Peh Swee Chin J (as he then was) invoked it). Any obligation emanating under s 71 of the 1950 Act must necessarily run independently from the modern law of contract and the law of torts. Lim Beng Choon J in *Pembinaan KSY Sdn Bhd v Lian Seng Sdn Bhd & Ors* [1992] 1 MLJ 571; [1991] 1 CLJ 776 at p 780 refused

to strike out the statement of claim as it was possible that the plaintiff's action could rest on either tort or s 71 of the 1950 Act. The defendant there argued that the statement of claim should be struck out for lack of a cause of action but the learned judge refused to strike out the action on the ground that the action could lie in s 71 of the 1950 Act. The learned judge's refusal can be construed to mean that s 71 of the 1950 Act gives rise to an independent cause of action. (Emphasis added.)

[76] In the same case at p 249 of the report, His Lordship (as he then was) added:

Basically, the underlying principle governing s 71 of the 1950 Act is the prevention of unjust enrichment. The future augurs well for restitutionary action under this section. Edgar Joseph Jr J (now FCJ) in *Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener)* [1992] 2 MLJ 434 at p 444 was inclined to invoke ss 70 and 71 of the 1950 Act to enable a purchaser of properties to be reimbursed for the advances he had paid for the discharge of a charge on properties which the chargor was to retain. *There was no necessity to plead* s 71 of the 1950 Act and that section would be vigorously applied provided the four ingredients have been proved to the hilt as was done by Peh Swee Chin J (as he then was) in *Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor*. His Lordship Peh Swee Chin J (as he then was) in that case granted specific performance to the plaintiffs there as he was troubled that the plaintiffs should 'gain more than what they had bargained for and get away with it'. His Lordship also knew that the plaintiffs there 'stood to gain and enjoy a benefit ie houses of superior quality by virtue of superior specifications'. To solve his predicament, his Lordship resorted to and invoked s 71 of the 1950 Act. His lordship was satisfied that all the ingredients have been fulfilled even though that section was not pleaded. His Lordship refused to order liquidated damages for the late delivery of the houses against the second defendant. In short, His Lordship had used the benefit gained as a set off against the claim for liquidated damages. (Emphasis added.)

[77] Further in *Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557; [1997] 1 CLJ 417, Mahadev Shankar JCA (as he then was) in delivering the judgment of the Court of Appeal held:

[1] With all due respect to the trial judge, if he thought that it was imperative that the statement of claim should plead compliance (notwithstanding that the fact of compliance was already on record by way of agreed document), he should have directed that the claim be amended.

[2] Striking out application under O 18 r 19 of the Rules of the High Court 1980 is a discretionary power to be exercised according to the justice of the case. The Supreme Court Practice is replete with judicial precedents to show that this was not a case of striking out and forensic courtesy should have persuaded Counsel for the defendant to inform the judge that the point was a non-starter. More so as it had not been properly pleaded as a defence.

[78] In comprehending s 71 of the Contracts Act 1950 and the authorities cited, this court finds that the section is specific because it can be used to deal with the situation where the transaction was done in a place where it is legal, the benefit was given and when there are difficulties to enforce it in another jurisdiction. Section 71 of the Contracts Act 1950 comes into play to assist or to provide justice. Section 26 of the Civil Law Act 1956 and s 31 of the Contracts Act 1950 on the other hand are general provisions and do not deal with situation where a transaction is valid and benefit given in foreign country and now the giver of such benefit wants to recover. Section 26 of the Civil Law Act 1956 states:

> Agreement by way of gaming or wagering to be null and void
>
> (1) All contracts or agreements whether by parol or in writing, by way of gaming or wagering shall be null and void
>
> (2) No action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made
>
> (3) ...
>
> (4) Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2), or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

[79] Section 31 states:

> 31 Agreements by way of wager void
>
> (1) Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

[80] This court agrees with the plaintiff's submission that even if the defendant argues that the loan is in fact 'gambling winning' disguised in the form of a credit (which the plaintiff denies), to bypass the effects of s 31 of the Contracts Act 1950 or the similarly worded s 26(2) of the Civil Law Act 1956 which is said to be procedural provision (following the dicta in the Singapore case of *Star City Pty Ltd (formerly known as Sydney Harbour Casino Pty Ltd v Tan Hong Woon* [2002] 1 SLR (R) 306), it is settled law in this country that equity in the form of the equitable doctrine of estoppel may be used to deprive a litigant of the benefit of a procedural provision as 'equity will not permit statute to be used as an engine of fraud'.

[81] In *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141, the Court of Appeal through the judgment of Gopal Sri Ram JCA (as he then was) stated:

> Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation. Its content was explained by Mohamed Azmi SCJ in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 296 in the following words:
>
> > It is not a fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see *Spry on Equitable Remedies* (2nd Ed) at p 236).
>
> The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any inequitable conduct. The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed and I am certainly unable to find any serious impediment in applying it to bar a litigant from raising and relying upon the provisions of the Limitation Act 1953.

[82] In *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651, the Court of Appeal stated as follows:

> Based on the foregoing evidence, it has been argued before us by the defendant that the plaintiff ought not to be permitted to rely on limitation to defeat the defendant's right to the monies in question because it would be inequitable to do so. In support of this argument, counsel relied upon the following passage in the judgment of this court in *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 at pp 155–156:
>
> > The doctrine of estoppel — whether one calls it promissory estoppel, estoppel by encouragement or estoppel by convention does not really matter — has reached such a stage that it may be used to deprive a litigant of the benefit of a procedural statute such as the Limitation Act 1953. The law upon this subject has been stated by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at pp 244–245. A reading of His Lordship's judgment in that case has left me with the impression that little or nothing may be usefully added to the learning contained therein.
> >
> > Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation. Its content was explained by Mohd Azmi SCJ in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 296 in the following words:
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In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 *at p 344, the Federal Court observed as follows*:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
>
> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1953.

In the present instance, the admitted promise by Loo was to pay the sum legitimately due to the defendant out of the balance of the monies which, according to other evidence earlier adverted to, were in the hands of KLCCH. Applying the principles set out in the cases referred to a moment ago to the facts and circumstances of the instant case, it would, in our judgment, be inequitable to permit Loo, and hence his estate represented by the plaintiff, to assert limitation against the defendant.

[83] Quite apart from the argument that procedural provision which can be overridden by equity as equity will not permit statute to be used as an engine of fraud, in the process to embark on what is to decided, meticulous examination of facts must be done. As such an application under O 18 r 19(1) of the ROC is not suitable to be entertained in this matter.

[84] Further, the plaintiff argued that in the event the court reaches the conclusion that the contract between the plaintiff and the defendant is void or has become void under any law, the remedy of restitution is available to the plaintiff and the defendant ought to restore to the plaintiff the advantage he has received under the transaction by virtue of s 66 of the Contracts Act 1950. For restitution under s 66 all that needs to be shown is that the plaintiff was unaware that the contract was void ab initio at the time of making the contract as stated by the Court of Appeal in *Thong Foo Ching & Ors v Shigenori Ono*

[1998] 4 MLJ 585 and that the defendant had acquired an advantage under the contract. In that case, the court found the agreement to be illegal but the court said it does not stop there. The court embarked on the question whether the party concerns should restore the benefit he derived from the contract.

[85] In the present case, the plaintiff argued that at the time of the pertinent transactions and dealings between the plaintiff and the defendant, the plaintiff stated that it had no knowledge of the laws of Malaysia in relation to the loan, let alone what the defendant is now alleging (and disputed by the plaintiff), ie that Malaysian law and public policy prohibits the enforcement and recovery of such debts. The plaintiff contended that any assertions of general statements as to enforceability of contracts in neighbouring jurisdictions in the Annual Report of the plaintiff's holding company (as opposed to the plaintiff, being a separate legal entity from its holding company), by no means constitutes any knowledge by the plaintiff of the laws of Malaysia. It is the plaintiff's contention that having utilised the loan which remains unsettled to the extent of HKD19,184,360 to date when the plaintiff was neither advised in law nor had the requisite knowledge of the Malaysian law pertaining to credit extended by casinos, the plaintiff ought to be restored and compensated with an equivalent amount by the defendant in the event this court rules that the contract is void under the Malaysian law.

[86] This court is of the considered view that the issue whether the plaintiff has the knowledge or otherwise cannot be decided on affidavit evidence alone. This case cannot be allowed to be struck out hinging on the general statement found in an annual report of the plaintiff's holding company. The fact that the plaintiff filed this present action means that it is of the position that gaming is enforceable in Malaysia.

[87] The defendant also contended that the plaintiff was concealing documents relating to the loan. From the affidavits (para 6.1 of encl 14 and from the letters exhibited in encl 17) this court finds that upon filing this suit there were requests for documents made by the defendant through his solicitors in Kuala Lumpur. The solicitors for the plaintiff in Hong Kong had produced the credit agreement, two credit line increase requests, six markers and a promissory note through their letter of 29 April 2015. This letter shows that the documents were given and received by the defendant even before this suit is filed. In addition, the documents are stated and pleaded in the statement of claim and as such this court finds that this contention is misleading.

[88] Lastly, the defendant also alleged that there are discrepancies as to the dates and front money being possibly an inducement for gambling. This court

finds that there is no such averment in the affidavits filed by the defendant and as such the plaintiff has been denied the opportunity to respond accordingly. This court rejects this allegation.

[89] Finally, this court observed that the allegation by the defendant that this present action is a 'lie' and a 'feigned action' which connotes fraud/deception, destroys the defendant's contention that this is a plain and obvious case for striking out.

CONCLUSION

[90] Accordingly, the plaintiff has merits in its claim based on the prevailing authorities and this court is of the considered view that this is certainly not a case that ought to be struck out under O 18 r 19 of the ROC. The very fact that the defendant labels the plaintiff's claim as 'gambling winnings' when the credit documents and the nature of the transaction point otherwise warrants the matter to be heard on merits rather than being struck out prematurely.

[91] Premised on the discussions alluded to in the above, this court dismissed the defendant's application in encl 8 with costs.

Defendant's application in encl 8 dismissed with costs.

Reported by Dzulqarnain Ab Fatar